No. 22,078

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

v.

NOEL HUNT McROBERTS, ET AL.,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLANT

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INDEX

CITATIONS

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JURISDICTIONAL STATEMENT

The appellees brought this action against the United States in the United States District Court for the Central District of California. Their complaint filed under the Federal Tort Claims Act, alleged that they had suffered damages as the result of the negligent driving of a serviceman, who was then on leave and operating his personally-owned automobile while enroute to his home for a six week vacation. Notwithstanding the use of his personal vehicle for personal purposes, the district court, after a separate trial limited to that issue, ruled that the serviceman was acting within the scope of his employment for the United States Government. (R. 26).

Subsequently, the United States, while reserving its right to appeal to this Court on the scope of employment issue, withdrew its contention that the serviceman was not negligent. The court below accordingly entered a judgment totaling $69,70.0 in favor of the appellees. (R. 30). The United States then noted this appeal. The jurisdiction of this Court is based upon 28 U.S.C. 1291.

STATEMENT OF THE CASE

This is an action for damages brought under the Federal Tort Claims Act resulting from an automobile collision on November 20, 1963, in which appellee Noel Hunt McRoberts was injured and in which his wife and his mother-in-law were killed. It is conceded that this collision, which occurred between the McRoberts' car and a car driven by Ray Allen Gorham, not a party to this action, was caused by the negligent passing maneuver of a third car driven by the serviceman, Aaron G. Bryant.

Bryant was an airman second class in the United States Air Force at the time of the accident. He had been permanently stationed with the 86th Air Transport Squadron at Travis Air Force Base, California for approximately one year. On November 4 and 5, 1963, Bryant received orders, permanently relieving him of his assignment at Travis Air Force Base and permanently transferring him, effective March 14, 1964, to the 315th Troop Carrier Group, Pacific Air Force, APO San Francisco. With respect to the intervening period, i.e. up to March 14, 1964, the orders provided as follows:

1. Vacation or Leave Time. Bryant was authorized to leave Travis Air Force Base on November 18, 1963, so that he could take 45 days of leave or vacation time before reporting at Pope Air Force Base in North Carolina on January 20, 1964. Bryant was authorized, but not required, to use a privately owned car, and if such transportation was used Bryant was allowed 12 additional days travel time between Travis Air Force Base and Pope Air Force Base.[1/]

2. Training School at Fort Pope. Between January 20, 1964, and February 26, 1964, Bryant was ordered to attend a 37 day Crew Training Course in C-123 Aircraft at Pope Air Force Base, North Carolina. This temporary assignment was evidently to prepare Bryant for his new permanent duty assignment.

3. Additional Temporary Duty. Finally, while enroute from Pope Air Force Base to his new assignment at the 315th Troop Carrier Group, Pacific Air Force, Bryant was authorized three days of temporary duty at the 405th Fighter Wing, Pacific Air Force, APO San Francisco.

Because of the accident the last two phases of Bryant's orders were never completed. It also is appropriate to note

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1/ The orders specified 26 days of actual travel time (R. 21) but this included a return drive to the west coast. The official authorized travel time from Travis Air Force Base, California, to Pope Air Force Base, North Carolina was 12 days. (R. 23).

here that Bryant could have left Travis Air Force Base by car as late as January 8, 1964, in order to arrive at Pope Air Force Base by January 20, 1964. However, taking full advantage of the vacation or leave granted to him for his personal use and convenience, Bryant chose to leave Travis Air Force Base immediately after completion of his base clearance in order to spend the Thanksgiving and Christmas holidays with his family at home in East Orange, New Jersey. Thus, on November 19, 1963, Bryant departed for home from Travis Air Force Base in his recently acquired privately owned car, taking with him several flying suits, his helmet and oxygen masks, and various tools issued him at Travis Air Force Base to be used during his flight training at Pope Air Force Base. (Tr. 46-47). Bryant's orders provided for shipping these items to Pope Air Force Base in the event he chose to travel by common carrier, e.g. plane or train or bus, rather than by private car. (R. 21). He was, of course, free to use any of these means of transportation.

On November 19, 1963, Bryant was given advance travel pay in the amount of $290.30 figured at the rate of six cents per mile for the official distance and to cover transportation, meals and lodging. (R. 23). On November 20, 1963, at approximately 10:00 a.m., he was driving east on Route 66 in San Bernardino County, California, when the accident occurred. Route 66 is the direct route to the east coast regardless of whether the ultimate destination is New Jersey or North Carolina.

The accident occurred when Bryant, accompanied by two hitch-hikers he had picked up, attempted to pass the two vehicles immediately in front of him. He pulled his car into the westbound lane to pass these vehicles when he first saw the car, driven by Ray Allen Gorham, approaching him in the westbound lane. Bryant pulled onto the lefthand shoulder but Gorham, in order to avoid hitting Bryant, swerved into the eastbound lane and hit the McRoberts car head-on.

On November 23, 1963, Bryant returned to Travis Air Force Base. His orders were cancelled shortly thereafter. (R. 22). He was charged with leave time for the time he had been away from the Base. (R. 22-23). Additionally, since Bryant had been on leave time, he was not reimbursed by the Air Force for the distance actually traveled and he was required to repay the lump sum advanced for travel. (R. 23). In February, 1964, he was discharged from the Air Force. (Tr. 45).

As already noted, the district court ruled that Bryant had been acting within the course and scope of his employment for the Government in driving his private automobile home for a vacation. (R. 26-27). The court placed particular reliance on the fact that Bryant was driving pursuant to written orders and that he was carrying equipment to be used by him at his destination, Pope Air Force Base.

STATUTES INVOLVED

Sections 1346(b) and 2674 of Title 28 U.S.C., The Federal Tort Claims Act, provide in pertinent part:

Section 1346. United States as defendant.

* * * * *

(b) Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Section 2674. Liability of the United States.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

SPECIFICATION OF ERRORS

1. The district court erred in holding that Airman Bryant was acting within the scope of his employment at the time of the accident.

2. The district court erred in entering judgment against the United States.

SUMMARY OF ARGUMENT

Under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2674, the United States is, of course, liable for injury caused by the negligent or wrongful act of a governmental employee only if the employee is acting within the scope of his employment. Furthermore, it has been settled, since Williams v. United States, 350 U.S. 857, that the question of whether federal employees are acting within the scope of their employment so as to render the Government liable for their acts depends not upon federal law but upon respondeat superior law of the state in which the act or omission occurred. See also, Witt v. United States, 319 F. 2d 704 (C.A. 9); Chapin v. United States, 258 F. 2d 465 (C.A. 9), certiorari denied, 359 U.S. 924, rehearing denied, 359 U.S. 976; United States v. Campbell, 172 F. 2d 500 (C.A. 5), certiorari denied, 337 U.S. 957. Therefore, in the instant case, the question of whether Aaron Bryant was acting within the scope of his employment at the time the accident occurred is to be resolved by the law of California, where the accident happened.

Under that law it is clear that an employee driving his own car home to enjoy a 45 day vacation is accommodating his own convenience and purely personal wishes. He is not then acting in the furtherance of his employer's business interests so as to charge the employer with vicarious liability for his tortious driving.

It is equally clear that under California law, the United States may not be held responsible in the present case because Bryant's use of his private car was in connection with a permanent change of his station. The starting point for any discussion of the application of California respondeat superior law to government employees travelling to or from a new job location in their own automobiles because they choose to go by that means of conveyance, rather than by available public conveyance, is this Court's decision in Chapin v. United States, 258 F. 2d 465, certiorari denied, 359 U.S. 924, rehearing denied 359 U.S. 976. In Chapin it was held that, under the law of California, servicemen travelling in their own automobiles to a base to which they had been re-assigned were not acting within the scope of their employment. This Court's decision in Chapin rested in large part upon a case decided by a California court, in which a private employer was absolved of liability for the negligence of an employee who chose to drive his own vehicle from one permanent job location to another. McVicar v. Union Oil Co., 138 Cal. App. 2d 370, 292 P. 2d 48 (1956). In Chapin, after a careful analysis, this Court concluded that "the basis of the McVicar case [is] that the act of travel by the employee is not one subject to the employer's control as a part of the duties the employee was hired to perform. Similarly, the act of a soldier's travel on a permanent change of station is not a part of the duties for which he is

gaged. It is conduct the control of which is beyond the erms of the employment relationship." 258 F. 2d at 469-70.

Both the California court in deciding McVicar, and this urt in deciding Chapin, stressed that it was the employee nd not the employer who chose the means of conveyance, that he employee had not been required to use his automobile, and hat the employer exercised no control over the details of the riving, or the condition of the automobile. Additionally it hould be noted that in both of those cases, as in the case ere, the accident occurred during leave time.

The present case differs from Chapin and McVicar only in hat Bryant, in proceeding from one permanent duty station to nother, was assigned two temporary duty stops in the interim. ut this difference neither requires, nor does it support, a esult different from that in Chapin. We submit that it can ake no difference that the employee was, in the course of a ermanent transfer, proceeding to his new permanent duty station s in Chapin, or to a temporary assignment prior to reporting o his new permanent duty station as in the present case. As n the Chapin case, the travel here occurred during a break n employment with a leave of absence enroute to the new duty tation. The fact that an interim destination here was a temporary duty station can have no bearing on the question of whether Aaron Bryant was within the scope of his employment.

In short, every reason mentioned in Chapin and McVicar for the employer's non-liability under California principles of respondeat superior applies with equal force here. The Judgment of the district court should therefore be reversed.

ARGUMENT

A. AN EMPLOYEE TRAVELLING IN HIS OWN CAR ON THE WAY HOME FOR A 45 DAY VACATION IS ACCOMMODATING HIS PERSONAL CONVENIENCE AND WHILE ON LEAVE IS NOT ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT.

Aaron Bryant was allowed 45 days of leave or vacation time and 12 days of authorized travel time between the time he left Travis Air Force Base on November 19, 1963, and the time he was to have arrived at Pope Air Force Base, Januar 1964. Manifestly Bryant would not have begun his trip east until January 8, 1964, had he not been given a vacation. Bryat time from November 19, 1963 to January 8, 1964, at which time he would have had to commence travel, was his own to do with as he pleased. These factors, together with Bryant's acknowledgement that he was going directly to his home in East Orang New Jersey, necessarily establish that Bryant was on vacation or on leave from duty at the time the accident occurred.

Numerous California cases have refused to impose liabilit on an employer where the accident occurred at a time when the employee was on his own time and pursuing his own personal

wishes and convenience.[2/] See e.g., Lee v. Nathan, 67 C.A. 111, 226 Pac. 970 (1924); Kish v. California State Auto Association, 190 C. 246, 212 Pac. 27 (1922). In fact, the employee in McVicar was travelling during his leave time.

The Supreme Court has stated that a soldier on leave is "at liberty to go where he will during the permitted absence, to employ his time as he pleases." United States v. Williamson, 23 Wall. 411, 415 (1874). It is clear that military personnel on leave, or on their own time, are not acting within the scope of their employment. E.g., United States v. Hainline, 315 F. 2d 153 (C A. 10), certiorari denied, 375 U.S. 895; Brucker v. United States, 338 F. 2d 427 (C.A. 9), certiorari denied, 381 U.S. 937; Bach v. United States, 92 F. Supp. 715 (S.D.N.Y.). Specifically it has been held that the act of driving between duty stations by soldiers is not within the scope of their employment when they are in an off-duty or leave status. McCall v. United States, 338 F. 2d 589 (C.A. 9), certiorari denied, 380 U.S. 974; Cobb v. United States, 247 F. Supp. 505 (N.D. Ill.), affirmed 367 F. 2d 132 (C.A. 7). Accord, Voytas v. United States, 256 F. 2d 786 (C.A. 7). As Judge Sobeloff noted in Cooner v. United States, 276 F. 2d 220, 225 (C.A. 4): "A

2/ Additional support for this rule is found in those California cases holding that an employer is not liable for the negligent driving of an employee going to or from work in his own automobile. See note 5, infra.

serviceman on leave or on pass, cannot normally be said to be acting within the scope of his employment. He is in a simila position to a private employee during the latter's non-work hours or vacation." Indeed, the imposition of liability on the United States in the Cooner case was justified by the Cou on the ground that the serviceman there involved was not on vacation or leave. See Cooner v. United States, supra, 276 F. 2d 220, 234.[3/] Since Bryant was on an extended leave or vacation, it is clear that his accident cannot be said to have occurred within the scope of his employment, but rather as pa of the furtherance of his own personal convenience and objecti

B. AN EMPLOYEE DRIVING HIS OWN CAR DURING A TRANSFER OF DUTY STATIONS, INVOLVING A SHARP BREAK IN EMPLOYMENT, IS NOT ACTING WITHIN THE SCOPE OF EMPLOYMENT.

Although Aaron Bryant was employed by the government, driving an automobile was not one of the duties of his job. H was in no way serving the interest of his employer by driving his car but rather he was acting on his own behalf since his duties at Travis Air Force Base had ceased and he had not yet begun his flight training at Pope Air Force Base. In Seivers

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3/ In Cooner v. United States, 276 F. 2d 220, 224 (C A. 4), Judge Sobleoff reviewed the facts of United States v Eleazer, 177 F. 2d 914 (C.A. 4), certiorari denied, 339 U.S. 903, and referring to the holding of no-government liability in that ca stated:

> * * * the decision there was clearly correct under the circumstances, as the lieutenant was on leave and traveling to his home for his own purposes

Both of those factors are, of course, also present in this case

United States, 194 F. Supp. 608, 613 (D. Ore.)[4/] involving a permanent transfer of duty station, the court stated that the employee "at all times remains an employee of the employer * * * [but] during the transfer period he is acting on his own." It is important, in this connection, to distinguish between the goal of ultimately arriving at Pope Air Force Base, which does benefit the employer, and the act of driving there.[5/] The driving by Bryant was an act bearing no relation to his employment and in no way itself served to benefit the Air Force. See United States v. Eleazer, 177 F. 2d 914, 917 (C.A. 4), certiorari denied, 339 U.S. 903; Gittleman v. Hoover Co., 337

4/ The facts of Seivers are remarkably similar to this case. Leave time plus travel time was granted to the soldier, a permanent transfer was involved, use of a privately owned car was authorized, and travel expenses would be reimbursed. The soldier was going home prior to reporting at his new duty station, and the accident occurred on a road which was the direct route to his home in Tennessee and his new duty station in New Jersey. The court found the driving outside the scope of employment. In reaching that decision the court applied Oregon law, but in doing so relied heavily on McVicar and Chapin as indications of the common law applicable to this question.

5/ Cobb v. United States, 247 F. Supp. 505 (D. Ill.) draws this same distinction and analogies to the rationale involved in finding that an employee is not acting within the scope of his employment in going to and coming from work. There can be no doubt that under California law, an employer would not be liable for the negligent driving of an employee going to or coming from work in his own automobile. See, e.g., Nussbaum v. Traung Label & Lithograph Co., 46 Cal. App. 561, 189 Pac. 728 (1920); Mauchle v. Panama-Pacific Intl. Exposition Co., 37 Cal. App. 715, 174 Pac. 400 (1918). Cf. Loos v. Boston Shoe Co., 123 Cal. App. 2d 564, 266 P. 2d 884 (1954).

Pa. 242, 10 A. 2d 411 (1940); Reiling v. Missouri Insurance Co., 236 Mo. App. 164, 178, 153 S.W. 2d 79, 86, (1941); Conversion and Surveys, Inc. v. Roach, 204 F. 2d 499 (C.A. 1); Parmlee v. Texas and New Orleans R. Co., 381 S.W. 2d 90 (Tex. Civ. App. 1964); Curtis v. Juengel, 297 S.W. 2d 598 (Missouri 1957). Additionally, in Chapin, this court stated:

> [W]hile travelling by self-selected means with competent orders concerned only with the ultimate reporting date, a soldier is not acting within the scope of his employment in the sense required for application of the doctrine of respondeat superior. Id. at 469.

More recently in Romitti v. United States, 363 F 2d 662 this Court, though holding the employer liable, stated that there were no "invariable rules" for determining whether a given act was within the scope of employment and reiterated its position in Chapin that "each case must be determined on its own peculiar facts and circumstances." Id. at 665. Additionally this Court noted:

6/ The employee there was travelling during his regular office hours and his temporary duty was completed in one morning. This court, in finding the employee within the scope of employment, characterized the brief trip as an errand for the employer's business which was being furthered, liability under the California law followed. That rationale is clearly not applicable here. California draws a distinction between transfer cases (such as the case here, as is seen by the decision in McVicar and this court's similar decision in Chapin) and special errand cases. See e.g., Vind v. Asamblea Aposlotic Cristo Jesus, 148 Cal. App. 2d 597, 307 P. 2d 85 (1957); Boynt v. McKales, 139 Cal. App. 2d 777, 294 P. 2d 733 (1956).

> Thus in Chapin these factors, plus the fact that the travel occurred during a sharp break in the course of the employment (the employee had terminated his work for his employer at one permanent station and had not yet begun work at the next), and that the employee was given leave of absence enroute, free of any obligation to his employer, permitted the inference that the employee was not furthering his employer's purposes when the accident occurred. Romitti v. United States, 363 F. 2d 662, 665-6.

The inference suggested in Romitti is plainly present in this case, as it was in Chapin. The only distinction which can be drawn between the facts of this case, and those present in Chapin is that the employee in Chapin was to be permanently stationed in Corpus Christi, whereas Aaron Bryant, although having permanently departed from Travis Air Force Base was re-assigned to a temporary duty station for purposes of flight training prior to reporting at his new permanent duty station. Nonetheless, the "sharp break in employment" emphasized in Romitti as being present in Chapin, was also present here. "[T]he employee had terminated his work for his employer at one permanent station and had not yet begun work at the next." Romitti v. United States, 363 F. 2d 662, 665-6.

C. THE RESPONDEAT SUPERIOR LAW OF CALIFORNIA MAKES THE EMPLOYER RESPONSIBLE ONLY IF HE HAD THE RIGHT TO CONTROL THE EMPLOYEE AT THE TIME OF THE ACCIDENT.

We have already shown that in driving his own car to his home for a 45 day vacation before effecting a permanent change of station Bryant was acting in furtherance of his personal

convenience and purposes and not those of his employer. For that reason alone, respondeat superior liability may not be imposed.

There is, however, an additional reason precluding the imposition of respondeat superior liability here, i.e. the lack of control over the employee's driving of his own car.

In Chapin v. United States, supra, this Court relied heavily on the California case of McVicar v. Union Oil Co., supra, in which an employee was driving his own truck from San Francisco to **Spokane** as part of a permanent transfer of job locations. In holding that such activity was not within the scope of employment, the court reasoned that the employer had no control or right of control over the "route, mode of transportation or any feature" of the trip. Id. at 373. The California court in McVicar relied heavily on United States v Sharpe, 189 F. 2d 239 (C.A. 4); and United States v. Eleazer, 177 F. 2d 914 (C.A. 4), certiorari denied, 339 U.S. 903. The latter of those two cases shows that the Restatement of Agency makes it clear that no liability would be imposed upon an employer in circumstances such as those present in this case (Restatement, Agency 2d, section 239, comment b):

> The fact that the instrumentality used by the servant is not owned by the master is a fact which may indicate that the use of the instrumentality is not authorized, or if authorized, that its use is not within the scope of employment. The master may authorize the use of a particular instrumentality without assuming

> control over its use as a master. The fact that he does not own it or had not rented it upon such terms that he can direct the manner in which it may be used indicates that the servant is to have a free hand in its use. If so, its control by the servant, although upon his master's business, is not within the scope of the employment. (emphasis added).

In the present case, as in McVicar and Chapin, the employee as not required to use an automobile for transportation nor id the employee's use of an automobile in an way benefit the mployer. On the contrary Bryant chose to drive for his own urpose and convenience, so that he could go to East Orange, ew Jersey to spend the Thanksgiving and Christmas holidays ith his family and, presumably, so that he could enjoy the se of a car during the time he was in New Jersey. The govern ent had no control over the condition of the car Bryant was riving, nor did it have any control over his method of opera ing the vehicle or in the details of his driving. Bryant ould have attempted to make the trip in as short or as long time as possible. He could have driven all day and all ight; or he could have used all his travel time plus his eave time to make a leisurely and scenic trip. The only nterest of the government was that Bryant arrive at Pope ir Force Base on or before January 20, 1964. Manifestly, hat interest falls far short of the type of control necessary o bring driving within the scope of his officially-assigned mployment duties and responsibilities. In Chapin, this court

applied the control test used in McVicar, and finding the employer had no right to control the mode of transportation and the manner of driving or the condition of the car, this Court stated:

> [T]he act of a soldier's travel on a permanent change of station is not a part of the duties for which he is engaged. It is conduct the control of which is beyond the terms of the employment relation. 258 F. 2d 465, 469-470.

The fact that the driver here involved was a serviceman[7/] cannot enlarge the area of the government's respondeat superio liability. Williams v. United States, 350 U.S. 857. Indeed, this Court in Chapin, reiterated the fact that the unique relationship of soldier to employer had no bearing in determining respondeat superior liability. Accord Bissel v. McElligott, 366 F. 2d 780 (C.A. 8); McCall v. United States, supra; United States v. Sharp, supra; United States v. Eleazer supra; Myers v. United States, 219 F. Supp. 71 (D. Mo.) affirmed 331 F. 2d 591 (C.A. 8).

Nor can the district court's imposition of liability be justified because of the fact that Airman Bryant was transporting "military clothing, tools and equipment." (R. 27)

7/ The findings of fact by the district court are replete with references to Airman Bryant's "orders", that he was driving pursuant to written orders, he was to spend leave in New Jersey set out in orders, and that he was carrying out the terms and directions contained in said orders. (R. 27). Airman Bryant's permission to take 45 days of leave, and to use his own car, while set out in what was captioned "Special Order" (R. 19), was authorized, but not commanded, and was more of a permission than an order.

Under California law this fact standing by itself, has little bearing on the scope of employment question. Thus, in McVicar the employee was transporting some equipment he used in his work and yet the court did not find that fact significant in determining whether respondeat superior liability should be imposed. The same effect see Cragun v Krossoff, 45 C.A 2d 480, 114 P. 2d 431 (1941); Conversions and Surveys, Inc. v. Roach, 204 F. 2d 499 (C.A. 1); Restatement of Agency 2d § 239, Comment b, Illustration 4. Moreover, it is clear that Bryant was transporting his own baggage only because he had decided--for personal reasons--to travel home by private car. There obviously was no showing, or even suggestion, that the baggage transportation by private car--rather than by common carrier--was in furtherance of the government's interests. Absent a showing, the court below improperly relied on Bryant's transportation of his own baggage. For that reason and for others outlined above, we submit that the court below erred in ruling that Bryant was acting within the scope of his employment.

CONCLUSION

For the reasons stated, we respectfully submit that the judgment of the district court should be reversed with directions that judgment be entered in favor of the United States.

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DECEMBER 1967

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with these rules.

Morton Hollander

Attorney

AFFIDAVIT OF SERVICE

CITY OF WASHINGTON)
DISTRICT OF COLUMBIA) SS.

Morton Hollander, being duly sworn, deposes and says:

That on December 15, 1967, he caused three copies of the foregoing brief for appellant to be served by air mail, postage prepaid, upon counsel for appellee:

Daniel C. Cathcart, Esquire
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Morton Hollander
Attorney for Appellant
Department of Justice,
Washington, D.C. 20530

Subscribed and Sworn to
before me this 15th day of December,
1967.

Angeline Johns
NOTARY PUBLIC

My commission expires April 14, 1972.